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No. _____

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In The

Supreme Court of the United States

October Term, 1990

REUBEN STURMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Is petitioner's prosecution on charges of RICO conspiracy and a completed RICO offense, based on an ongoing agreement to violate federal obscenity laws through mailings and interstate shipments of obscene materials by a retail bookstore in Nevada, barred by the Double Jeopary Clause as interpreted by this Court in Grady v. Corbin, 110 S. Ct. 2084 (1990), because petitioner was previously acquitted of conspiracy under 18 U.S.C. § 371 to violate the federal obscenity laws in connection with a nationwide vertically-integrated distribution scheme involving suppliers, wholesale distributors and retail bookstores, including the same retail bookstore in Nevada?

II.

Is the appropriate standard of appellate review to be applied to a claim of former jeopardy that of de novo, plenary review, as the Third and Eleventh Circuits have held, or is such a claim subject to review only for clear error as the Sixth and Tenth Circuits, and in this case, the Ninth Circuit, have held?

III.

Where a second indictment charges an accused with the same conspiracy for which he was previously charged, tried and acquitted, does the inclusion in the second indictment of allegations that the conspiracy continued beyond the date of the first trial insulate the second indictment from attack under the Double Jeopardy Clause?

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No.

In The

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October Term, 1990

REUBEN STURMAN,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Reuben Sturman prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, which affirmed the denial of his motion to dismiss on double jeopardy grounds Counts 1 and 2 of an indictment pending against him in the United States District Court

for the District of Nevada.

OPINIONS BELOW

The unreported memorandum decision of the United States Court of Appeals for the Ninth Circuit is set forth in the Appendix at A1-A8. The unreported order of the District Court for the District of Nevada is set forth at A9-A28. The unreported order of the Ninth Circuit denying the petition for rehearing is set forth at A29.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was filed on November 20, 1990. Petitioner timely filed a petition for rehearing which was denied on February 20, 1990. This Court has jurisdiction to review the decision below by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States. The statutory provisions involved are 18 U.S.C. § 1962 and 18 U.S.C. § 371. The foregoing constitutional and statutory provisions are set forth in the Appendix at A30-A34.

STATEMENT OF THE CASE

This petition seeks review of the judgment of the United States Court of Appeals for the Ninth Circuit affirming the denial of petitioner's motion to dismiss, on double jeopardy grounds, counts 1 and 2 of an indictment pending against him, which charge a RICO conspiracy and completed RICO offense, respectively, beginning in 1973.

This case presents the Court with the opportunity to address signifi-

cant and recurring questions concerning the scope, meaning and application of the new test for determining whether a second prosecution is barred by the Double Jeopardy Clause enunciated last term in Grady v. Corbin, 110 S. Ct. 2084 (1990). More particularly, this case would enable the Court to define and clarify the double jeopardy analysis to be applied to the ever-increasing number of criminal prosecutions charging continuing and complex-compound offenses, such as conspiracy to commit offenses against the United States under 18 U.S.C. § 371, conspiracy to violate the RICO law under 18 U.S.C. § 1962(d), as well as completed RICO offenses under 18 U.S.C. § 1962. Indeed, the question whether the new test for double jeopardy stated in Grady applies to continuing crimes is one on which the courts of appeals are already divided, notwithstanding the recency of that

decision.

And the instant case squarely presents the Court with the opportunity to resolve the existing conflict among the circuits as to the appropriate level of appellate review to which a claim of former jeopardy is to be accorded.

Petitioner maintains that his acquittal, in 1978, of conspiring to distribute obscene materials across the nation between 1973 and 1976, bars the prosecution of counts 1 and 2 of the ten count indictment pending against him, which charge a RICO conspiracy and completed RICO offense relating to the distribution of obscene materials from 1973 until the return of the indictment. Specifically, petitioner's claim is that the indictment, on its face, reveals that the government has carved out a segment of the conspiracy for which petitioner previously stood trial, the Nevada portion,

and, having failed to convict him in 1978, intends, in this case, to "prove conduct that constitutes an offense for which [petitioner] has already been prosecuted." Grady, 110 S. Ct. at 2087.

A. The Cleveland Indictment

In 1976, a multi-count indictment was returned in the United States District Court for the Northern District of Ohio, located in Cleveland, which charged petitioner, together with Sovereign News Company and five other co-defendants, with conspiring to violate the federal obscenity laws, 18 U.S.C. §§ 1461, 1462 and 1465, in violation of 18 U.S.C. § 371, as well as with numerous substantive obscenity offenses. The conspiracy set forth in Count 1 alleged an agreement beginning in 1973 and continuing until the indictment's return to mail and transport across state lines obscene

material in violation of 18 U.S.C. § 371. All of the overt acts alleged in the indictment related to the shipment of sexually explicit materials from Sovereign News in Cleveland, Ohio, to a retail adult bookstore in Fort Worth, Texas.

In spite of the fact that the overt acts related to shipments from Sovereign News to a single retail bookstore in Texas, the transcript of the trial in 1978 reveals that over petitioner's constant objection, the government introduced evidence, attempted to prove and argued to the court and to the jury that petitioner was at the top of a massive, vertically-integrated nationwide conspiracy headquartered at Sovereign News to transport, ship and distribute sexually explicit obscene materials throughout the entire United States to both wholesale regional distributors located throughout the country (or "Agen-

cies," as they were known) and retail adult bookstores. See, e.g., Tr. 733, 915-920, 1612, 2764, 2775.[1/]

The testimony of Sovereign News' employees established that Sovereign News distributed material to eight or nine wholesale agencies located in principal cities throughout the nation, which would, in turn, distribute the material to the retail adult book stores which were affiliated with them. The testimony of one witness, Maurice Escott, was to the effect that petitioner controlled 80 to 100 retail adult bookstores throughout the country.

The involvement of these agencies and bookstores was further fleshed out through the documentary evidence constantly referred to throughout the trial

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[1/] "Tr" refers to the transcript of the Cleveland trial.

or admitted into evidence at the trial. By way of example, Government Exhibit 276 was a list of the agencies and retail stores which the government claimed were part of the conspiracy. It was seized during the execution of a search warrant at Sovereign News in March of 1975. Tr. 865. The last page of that exhibit lists the stores serviced by Sundial Distributors in Denver, Colorado, Tr. 867, an agency which is specifically mentioned in the indictment in this case, and specifically lists as bookstores serviced by it under the Las Vegas heading, Talk of the Town Bookstore in Las Vegas, and The Pearl Book Store in Las Vegas, both of which are featured prominently in the conspiracy charged in this case.

It was on the theory that petitioner operated and controlled Sovereign News, the agencies and the retail bookstores connected with those agencies, and

that he and his co-defendants, along with unnamed co-conspirators, had been involved in a massive on-going, nationwide conspiracy involving that distribution scheme to violate the obscenity laws that the case was submitted to a jury. Tr. 2779. After five days of deliberation, all defendants were acquitted of all charges by the jury in July of 1978.[2/]

B. The Current Indictment

On October 5, 1987, an indictment was returned in the District of Nevada charging petitioner and others,

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[2/] An indictment was returned in the Western District of Pennsylvania on the heels of petitioner's acquittal, which charged him with conspiracy to violate the obscenity laws as well as substantive obscenity offenses. The conspiracy count, which related to the Pittsburgh segment of the Cleveland conspiracy, was dismissed on double jeopardy grounds. United States v. Kamins, 479 F. Supp. 1374 (W.D. Pa. 1979).

both named and unnamed, with a RICO conspiracy and completed RICO offense relating to the mailing and transportation across state lines of obscene materials, dating back to 1973, as well as with substantive obscenity offenses. That indictment was superseded twice. The second superseding indictment pending against petitioner was returned February 10, 1989.

Specifically, Count 1, which charges a RICO conspiracy under 18 U.S.C. § 1962(d), alleges that beginning in June of 1973 and continuing until the return of the indictment, petitioner conspired to operate the RICO enterprise, defined as the Talk of the Town Bookstore, a retail bookstore located in Las Vegas, Nevada, and its subsidiaries and affiliates in Nevada and California, through a pattern of racketeering activity, namely, through the mailing and interstate trans-

poration of allegedly obscene films.

Count 2 of the indictment, which charges a completed RICO offense, alleges that beginning in June of 1973 and continuing until the indictment was returned, the affairs of the RICO enterprise were in fact conducted through a pattern of racketeering activity, and identifies eight predicate acts of racketeering, namely, the mailing or interstate shipment of allegedly obscene materials between 1985 and 1987.

Paragraph 2 of Count 1 of the indictment expressly alleges that the unlawful agreement which forms the basis of the conspiracy charge against petitioner was in place and complete on or about June 1, 1973, and continued until the date of the indictment and thus encompasses the entire time period of the conspiracy for which petitioner was acquitted in Cleveland in 1978. Count 1

further alleges that as part of the conspiracy, petitioner, through Sovereign News, which was at the top of the distribution scheme proved at the Cleveland trial, and Sundial Distributors, both of which are alleged to be businesses controlled by him, as well as through other businesses, would supply Talk of the Town Bookstore and its subsidiaries and affiliates with sexually explicit materials for resale. That is the precise agreement that was charged and proved at petitioner's trial in Cleveland and of which he was acquitted in 1978.

The indictment also charges in Count 1 that as part of the conspiracy, revenues from the Talk of the Town Bookstore were regularly transported at petitioner's direction to Cleveland, Ohio, which of course was the headquarters of the Cleveland conspiracy.

According to the indictment, all of the means and methods by which the conspiracy operated were in place in 1976 when the indictment was returned against petitioner in Cleveland and in 1978 when petitioner was acquitted in Cleveland.

Likewise, many of the overt acts alleged in Count 1 of the indictment in the case at bar are embraced within the time period of the Cleveland conspiracy and were in place at the time the indictment was returned against him. What is more, they expressly charge the very conduct for which petitioner was prosecuted in Cleveland. Paragraphs 1 and 2 of that section of Count 1 focus on petitioner's purchase of Talk of the Town and the "peep booth" portion of that bookstore in late 1973 or early 1974, that is, right in the middle of the Cleveland conspiracy. Similarly, paragraph 14 alleges that by June 6, 1973, and continuing un-

til the indictment was returned, a time period which encompasses the entire Cleveland conspiracy, petitioner had agreed that Talk of the Town would distribute the exact same types of films and videotapes that form the basis of the substantive obscenity counts set forth in Counts 3 through 10 of the indictment, as well as the predicate acts of racketeering charged in Counts 1 and 2 themselves.

Paragraphs 15 and 16 of the overt acts section parallel paragraph 5 of the means and methods section, which alleges that Sovereign News and Sundial would supply Talk of the Town with materials for resale, for these paragraphs allege that beginning in June of 1973 and thereafter petitioner agreed to, and did, supply Talk of the Town Bookstore with sexually explicit obscene materials through various businesses he controlled. That is precisely what the massive con-

spiracy petitioner was acquitted of in 1978 charged, namely, the distribution of sexually explicit obscene materials through Sovereign News to distributors and retail adult bookstores throughout the United States.

Paragraph 17 is noteworthy, for it charges that by June of 1973 and continuing until the return of the indictment, petitioner had agreed that Talk of the Town would distribute all but two of the films that form the basis of predicate acts of racketeering charged in Counts 1 and 2 of the current indictment.[3/] And, paragraphs 27 through 33 of

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[3/] Paragraph 17 incorporates by reference the films and videotapes described in paragraphs 9 and 10 of the "Means and Methods" portion of Count 1. However, paragraph 9 does not describe any films, but deals with the concealment of ownership. Paragraph 11, however, does describe two films, and if the government actually intended to incorporate paragraphs 10 and 11 rather than para-
(Footnote cont.)

the overt acts charged in Count 1 allege that as early as June of 1973, petitioner caused Talk of the Town to stock for distribution all but one of the very same films or videotapes which constitute the predicate acts of racketeering activity. All of these acts were completed and in place years before the 1978 conspiracy trial.

Count 2 of the indictment pending against petitioner, which charges a completed RICO offense, likewise alleges that the crime charged therein had occurred as early as 1973. Specifically, par-

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graphs 9 and 10, then the government is claiming that five years before petitioner's trial in 1978, appellant had agreed that all eight of the films charged as the predicate acts of racketeering would be stocked and distributed by Talk of the Town. In any event, the indictment is clear that five years before the 1978 trial, petitioner had allegedly agreed that six of eight films listed in this indictment were to be distributed.

agraph 2 of that Count charges that petitioner, from at least June 1, 1973 and continuing to the return of the indictment, engaged in, and conducted the affairs of the enterprise though a pattern of racketeering by means of the interstate transportation and mailing of sexually explicit obscene films. As was noted above, the eight predicate acts of racketeering took place between 1985 and 1987, according to the indictment.

C. The Proceedings Below

On June 19, 1990, petitioner moved in the district court to dismiss counts 1 and 2 of the present indictment, arguing that because of his acquittal in 1978, prosecution of those two counts was barred by the Double Jeopardy Clause as interpreted by this Court in Grady v. Corbin, 110 S. Ct. 2084 (1990). He

claimed that counts 1 and 2, when placed next to the conduct charged and prosecuted at the Cleveland trial compelled the conclusion that the government had revived the same conspiratorial agreement of which petitioner had been acquitted and that to prove one or more essential elements of those two counts, the government "would prove conduct for which [he] has already been prosecuted." Grady, 110 S. Ct. at 2087.

The district court, after hearing oral argument on petitioner's motion and reviewing much of the record of the Cleveland trial, denied petitioner's motion on two grounds. The court acknowledged that the conspiracy charged in this case completely overlapped the Cleveland conspiracy and agreed with petitioner that the government attempted in 1978 to prove a nationwide conspiracy to distribute obscene materials headed by

him in Cleveland. It further noted that the government in this case intends to rely on records seized from Sovereign News in 1975 to establish a conspiracy as of 1973, which it relied on in Cleveland to prove the scope of the Cleveland conspiracy, and that evidence in the Cleveland trial included information about, and memoranda distributed to, retail bookstores at the center of this case. And, although also acknowledging that evidence at the Cleveland trial established that the retail stores controlled by petitioner received materials from Sovereign News and Sundial, the district court nevertheless concluded that the two conspiracies were different because the Cleveland conspiracy focused on an agreement between petitioner and the regional distributors while the conspiracy charged in the instant case charged an agreement between petitioner and retail bookstores.

Order at 4-7; App. at A14-21.

As a second, alternative, basis for its decision, the court held that even if the two conspiracies were the same, Grady was limited to situations where all of the conduct giving rise to multiple offenses occurs at the same instant or is known to the government at the time of the initial prosecution, suggesting that Grady's holding was not applicable to continuing offenses or to complex-compund offenses. Because the indictment charged that the agreement continued beyond petitioner's acquittal, the court concluded the Double Jeopardy Clause did not bar this prosecution. Order at 8-10; App. at A22-A27.

Petitioner appealed the district court's decision to the Ninth Circuit Court of Appeals pursuant to Abney v. United States, 431 U.S. 651, 97 S. Ct. 2034 (1977), and, relying on United

States v. Guido, 597 F.2d 194 (9th Cir. 1979) (per curiam), urged that court to review the constitutional question presented de novo. Although the Ninth Circuit found that petitioner had made a non-frivolous showing of former jeopardy and that the Cleveland conspiracy was implicated by the indictment, memorandum at 2, 4; App. at A3, A7, the court refused to review the constitutional question raised de novo and instead, relying on its decision in United States v. Bendis, 681 F.2d 561 (9th Cir. 1981), reviewed the decision of the district court only for clear error. Applying that deferential standard of review, the appellate court affirmed on the basis that it could not say the district court had been clearly wrong in concluding that the Cleveland conspiracy was limited to the wholesale distributors or agencies and

did not extend to the retail stores.[4/]

Petitioner requested that the court rehear the case on the ground, inter alia, that it erroneously applied a clear error standard of review when it should have reviewed the constitutional issue raised by petitioner de novo. The court ordered the government to respond to petitioner's argument on that issue, but ultimately declined to grant rehearing in the case.

The petitioner now seeks review by this Court of the important questions presented by this case.

[4/] Because it refused to disturb the district court's holding that the Cleveland conspiracy was different from that charged in the present case, the court of appeals found it unnecessary to consider the district court's alternative reason for denying petitioner's motion to dismiss. Memorandum at 4 n.1; App. at A5 n.1.

REASONS FOR GRANTING THE WRIT

I. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER PETITIONER'S PROSECUTION ON CHARGES OF RICO CONSPIRACY AND A COMPLETED RICO OFFENSE, BASED ON AN ONGOING AGREEMENT TO VIOLATE FEDERAL OBSCENITY LAWS THROUGH MAILINGS AND INTERSTATE SHIPMENTS OF OBSCENE MATERIALS BY A RETAIL BOOKSTORE IN NEVADA, IS BARRED BY THE DOUBLE JEOPARDY CLAUSE AS INTERPRETED BY THIS COURT IN **GRADY V. CORBIN**, 110 S. CT. 2084 (1990), BECAUSE PETITIONER WAS PREVIOUSLY ACQUITTED OF CONSPIRACY UNDER 18 U.S.C. § 371 TO VIOLATE THE FEDERAL OBSCENITY LAWS IN CONNECTION WITH A NATIONWIDE VERTICALLY-INTEGRATED DISTRIBUTION SCHEME INVOLVING SUPPLIERS, WHOLESALE DISTRIBUTORS AND RETAIL BOOKSTORES, INCLUDING THE SAME RETAIL BOOKSTORE IN NEVADA.

In this case, the Court is presented with the opportunity to amplify and clarify for the lower federal and state courts the new test for double jeopardy set forth in the landmark case of Grady v. Corbin, 110 S. Ct. 2084 (1990), as well as to correct the manifest error committed by the courts below in analying the concededly difficult and complex

double jeopardy questions raised in a context that is becoming increasingly common -- successive prosecutions for conspiracy and RICO, or other complex-compound crimes, based upon the same on-going course of conduct.

The denial of petitioner's motion to dismiss, on double jeopardy grounds, counts 1 and 2 of the indictment pending against him was predicated upon the conclusion reached by the district court that the agreement to distribute obscene materials nationwide, of which petitioner was acquitted in 1978, was limited to the wholesale distributors or agencies and did not include the retail bookstores within its scope.

But in reaching that conclusion, the district court conceded the similarity that existed between the two conspiracies. Specifically, it noted that although the RICO predicate acts were all-

eged to have occurred between 1985 and 1987, the "government nevertheless alleged a RICO conspiracy beginning in 1973, thereby overlapping the Cleveland conspiracy." Order at 2; App. at All. And, it further observed that to prove the conspiratorial agreement charged in the case at bar, the government intends to rely upon documents seized during two March, 1975 searches of Sovereign News which were offered at petitioner's 1978 trial to prove the scope of that conspiracy. Order at 2; App. at All-12.

In addition to the overlap in time and in the evidence intended to prove the existence and scope of the two conspiracies, the district court acknowledged that the Talk of the Town and Sundial Distributors, which are at the heart of this case, were involved in the conspiracy proved by the government in 1978:

> True, in 1978 the government attempted to prove a nationwide conspiracy emanating from Cleveland, Ohio and controlled by Reuben Sturman. Both indictments also deal with the interstate transportation of obscene material. Additionally, some of the exhibits contained information about, memos sent to, or shipments for Talk of the Town, as well as other bookstores at issue in this indictment. And some evidence indicated that the distribution channel used by the Cleveland conspiracy included Sturman controlled retail bookstores that received their materials either directly from Sovereign News itself or from the Sovereign News "agency companies," including Sundial Distributors in Denver.

Order at 5; App. at A16-17. What is more, the court further recognized that during the Cleveland trial there was testimonial evidence that petitioner "controlled the day-to-day operation of approximately 80 to 100 retail bookstores throughout the country." Order at 6; App. at A19.

Nevertheless, the district court held that Counts 1 and 2 of the indictment in the case at bar did not offend the Double Jeopardy Clause because the two conspiracies were different. Specifically, it held that "during the Cleveland trial the government focused on the conspiracy between Sovereign News and the agency companies," Order at 5; App. at A17, while the indictment in the case at bar focuses upon an agreement between petitioner and the retail stores.

On appeal, the Ninth Circuit agreed with petitioner that he was acquitted of a nationwide conspiracy in 1978 which was headquartered in Cleveland. It, too, acknowledged that during petitioner's Cleveland trial, evidence not only described the distribution of materials to retail stores, but also showed that petitioner and his co-defendants controlled a number of them. But

it refused to review the double jeopardy issue de novo and, applying a deferential, clearly erroneous standard, upheld the lower court's conclusion that the retail bookstores were not a part of the conspiracy of which petitioner was acquitted, and therefore, that the Double Jeopardy Clause did not bar petitioner's prosecution on counts 1 and 2 of the present indictment. This was constitutional error.

Clearly, the scope of a charged conspiracy that has proceeded to trial is most conclusively ascertained by looking at the government's arguments made at the trial both to the court and jury as to the nature and scope of the conspiracy it has charged and proven by the evidence; the findings, if any, made by the trial court as to the scope of the conspiracy charged and shown by the evidence; and the trial court's charge to the jury as

to the breadth of the conspiracy and what the government was required to establish to sustain its burden of proof.

In the present case, an examination of the record of the Cleveland trial for these indicators leads to the conclusion that the retail bookstores were within the scope of the Cleveland conspiracy charged and sought to be proved by the government.

Near the conclusion of the government's case-in-chief at the Cleveland trial, the trial court entertained arguments from both the government and the defendants as to whether the government had established the existence of a conspiracy and that conspiracy's scope before ruling on the admissibility of certain evidence.

The government, in urging the admissibility of that evidence, clearly and unambiguously declared that the re-

tail bookstores were within the scope of the conspiracy of which petitioner stood accused. It argued:

> There were ... numerous shipping documents relating to shipments of merchandise which the Government contends is obscene from Sovereign News Company to these various agencies and to various bookstores.
>
> The Government contends that Mr. Sturman is involved and implicated in all these shipments as the head of Sovereign News Company.
>
> There is also verbal testimony to the effect that Reuben Sturman is the head of Western Reserve Enterprises and Western Reserve Enterprises receives financial reports from some 80 to 100 retail stores.
>
> I think this shows the scope of the conspiracy, and that these retail stores were facilities that were used as part of the plan and scheme to ship obscene merchandise interstate.
>
> There were also more explicit and more detailed testimony from Mrs. Carberry who testified how financial reports not only of Castle News Agency but of some 11 or 12 stores under the jurisdiction of Castle News Agency, were all shipped to Sovereign

News Company; although not named directly, apparently to Mr. Sturman, and I think the inference is clear that they were for his ultimate perusal and consideration.

I think basically, your Honor, that outlines the Government's case with respect to Reuben Sturman.

Tr. 1612-13 (emphasis added).

The government's argument carried the day, for, in its oral opinion concluding that the government had, in fact, proven the existence of a conspiracy by a preponderance of the evidence and that the conspiracy included the retail bookstores, the trial court opined:

> Bearing all in mind the evidence shows through invoices and other business records of The Sovereign News Company that sexually explicit magazines and films are being purchased through the channels of interstate and foreign commerce and are being sold and mailed or shipped by common carrier to agency companies of Sovereign News located in principal cities in this country. These include Chicago, Buffalo, Boston, Philadelphia, Milwaukee, Pittsburgh,

> Baltimore and Denver. These agency companies actually part of the Sovereign News operation in turn resell these magazines and films to local retailers. Sovereign also makes direct sales to various retailers it appears from the evidence.

Tr. 1788-89 (emphasis added). Thus, the trial court in Cleveland expressly found that the retail bookstores were in fact a part of the conspiracy with which petitioner was charged.

What is more, the government emphasized the massive nature of the conspiracy, including the role played by the retail bookstores, in its closing argument to the jury. Specifically, the government argued to that body:

> We ... have the conspiracy count in the indictment which charges an overall plan or scheme to ship obscene material into states by use of the mails, by the use of interstate carriers.
>
> Now, this plan or scheme or conspiracy is not limited to the merchandise that was sent to Fort Worth. This embraces the entire operation, the sending of

obscene material by these means, mail or common carrier, across State lines throughout the period from 1973 to 1976. So the charge is that they planned, schemed, conspired to do these things.

The invoices, the documentation that you will find in evidence in the case are proof of this conspiracy indicating that in many instances this plan or scheme was in fact carried out, that this merchandise was shipped to many places throughout the country, not just to Webster's Bookstore, but to many places.

I think the evidence is clear in the case from the testimony of a number of witnesses who worked for, still work for Reuben Sturman, that he is the head of the Sovereign News Company, that he not only operates and controls Sovereign News, but the agencies and many retail stores connected with the various agencies throughout the country.

Tr. 2778-79 (emphasis added). See also, Tr. at 1044.

And, consistent with its earlier ruling and the government's argument, the trial court's instructions to the jury made it clear once more that the conspir-

acy was not limited to the regional distributors, but that it also encompassed the retail bookstores. Thus, the court charged with respect to the intent element of the conspiracy offense, that the government could meet its burden of proof by showing:

> (1) the principal or the exclusive business of Sovereign News Company, during the indicated period, was to buy, sell and distribute sexually explicit magazines and films that are obscene as determined under the three-prong test given you in the first element; and such materials were either distributed through the United States mails (in violation of Section 1461), or between different states of the United States by interstate common carrier (in violation of Section 1462), or by interstate transportation for purpose of sale or distribution (in violation of Section 1465); and further, that in carrying on this business of Sovereign News Company, one or more defendants caused magazines and films to be mailed, shipped or transported in interstate commerce; and (2) that the particular defendant under consideration, in performing his particular work and function in carrying on the

> business, knew that sexually explicit magazines and films were caused to be shipped from Sovereign News Company to regional agencies of Sovereign News Company, to retail stores, and from suppliers to regional agencies and in making such shipments that the use of the mails, interstate carriers, or interstate transportation would follow in the ordinary course of business or that such use may have been reasonably foreseen.

Tr. 3195-96. (Emphasis added).

Thus it is manifestly clear that both of the courts below erred in concluding that the retail stores were not a part of the conspiracy, and it is further clear that counts 1 and 2 of the pending indictment charge, and the government intends to prove in connection with those counts, "conduct for which [petitioner] has already been prosecuted." Because of the constitutional error committed below, the Court should grant this petition.

II. A SIGNIFICANT QUESTION IS PRESENTED, ON WHICH THE CIRCUIT COURTS OF APPEALS ARE DIVIDED, AS TO WHETHER THE APPROPRIATE STANDARD OF APPELLATE REVIEW TO BE APPLIED TO A CLAIM OF FORMER JEOPARDY IS THAT OF **DE NOVO**, PLENARY REVIEW OR WHETHER SUCH A CLAIM IS SUBJECT ONLY TO REVIEW FOR CLEAR ERROR.

It is often the case that the meaningfulness of appellate review is inextricably bound up with the scope of review given to the district court's decision by the court of appeals. This case is a prime example, for had the Ninth Circuit reviewed the district court's analysis of the double jeopardy issue under a plenary, de novo standard of review, rather than deferring to that court's decision under a clearly erroneous standard, it is entirely likely it would have changed the outcome of petitioner's appeal. This case presents the Court with the opportunity to resolve the conflict that exists among the courts of

appeals concerning the level of appellate review to be given to double jeopardy claims.

This Court has long held that "where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts," an independent, de novo review of the facts will be undertaken. Fiske v. Kansas, 274 U.S. 380, 385-86, 47 S. Ct. 655, 656-57 (1927). See also Jacobellis v. State of Ohio, 378 U.S. 184, 189, 84 S. Ct. 1676, 1678 (1964); Hoover & Allison Co. v. Evatt, 324 U.S. 652, 659, 65 S. Ct. 870, 874 (1945); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 500-01, 104 S. Ct. 1949, 1959-60 (1984).

In affirming the order of the district court, the court of appeals reviewed the lower court's legal conclusion

that the prosecution of Counts 1 and 2 did not violate the Double Jeopardy Clause only for clear error, rather than subjecting that determination to plenary, de novo review. Specifically, the court of appeals held:

> The district court found the indictment in the present case alleged a RICO conspiracy focusing on an agreement between Sturman and other owners of retail outlets regarding the retail distribution of pornographic materials, whereas the conspiracy which was the subject of the Cleveland trial focused on an agreement between Sturman, Sovereign News, and other "agency companies" or distributors not named in the Cleveland indictment regarding the regional or wholesale distribution of pornography. Speaking of the present indictment, the court found "that there is a different agreement entered into by different conspirators with a different focus than the Cleveland conspiracy.

Memorandum at 3-4; App. at A5-A6. It concluded, "On the present record, we cannot say these findings are clearly wrong." Memorandum at 4; App. at A6.

(Footnote omitted).

Petitioner asserted in his brief that the court should review the lower court's decision de novo, pursuant to its decision in United States v. Guido, 597 F.2d 194 (9th Cir. 1979) (per curiam). The Ninth Circuit, however, distinguished Guido on the basis that Guido involved a double jeopardy claim raised following a second trial and held, relying on its decision in United States v. Bendis, 681 F.2d 561 (9th Cir. 1981), that since petitioner's second trial had not yet commenced, the decision of the district court would be reviewed only for clear error. Memorandum at 2; App. at A3.

In the present case, the issue found to be dispositive by the district court and the court of appeals -- whether the retail stores were embraced by the Cleveland conspiracy -- depends entirely upon the record made during the Cleveland

trial and presents the purely legal question of the scope of the conspiracy for which petitioner stood trial. It is undisputed that the conspiracy charged in the case at bar includes the retail stores. Thus, a pure question of law was presented to the court of appeals for resolution. Nevertheless, the Ninth Circuit reviewed the district court's decision only for clear error, rather than applying de novo, plenary review, in spite of the fact that the instant appeal raised only legal issues and did not involve any disputed issues of fact.

The confusion in the Ninth Circuit over the scope of review of a double jeopardy claim -- de novo review is given to a double jeopardy claim on appeal after a second trial has occurred, United States v. Guido, 597 F.2d 194 (9th Cir. 1979), while a double jeopardy claim asserted on an Abney appeal is only ac-

corded review under a clearly erroneous standard, United States v. Bendis, 681 F.2d 561 (9th Cir. 1981) -- mirrors the split among the other federal courts of appeals over the standard of appellate review to be given double jeopardy claims. Specifically, the Third and Eleventh Circuits have clearly stated that claims of former jeopardy are subject to plenary, de novo review. See, e.g., United States v. Cianciglini, 858 F.2d 923, 926 (3d Cir. 1988); United States v. Benefield, 874 F.2d 1503, 1505 (11th Cir. 1989). On the other hand, the Sixth and Tenth Circuits have stated that double jeopardy claims are reviewed under a deferential, clearly erroneous standard. See, e.g., United States v. Jabara, 644 F.2d 574 (6th Cir. 1981); United States v. Beachner Construction Co., 729 F.2d 1278 (10th Cir. 1984).

The Eighth Circuit reviews the factual findings of the lower court on such questions as the credibility of witnesses or disputed issues of historical fact under a clearly erroneous standard, but reviews the legal conclusion reached by the court de novo. United States v. Thomas, 759 F.2d 659, 663 (8th Cir. 1985).

The decision of the court of appeals in the case at bar not to review de novo the purely legal issue of whether Counts 1 and 2 of the second superseding indictment charged petitioner with the same conduct for which he had been acquitted cannot be countenanced. For, the "ultimate question, which involves comparing the first indictment and the proof at the first trial to the second indictment and the proof to be offered at the second trial is an issue of law ...." United States v. Thomas, 759 F.2d at 662.

A clear statement from this Court as to the appropriate standard of appellate review of a double jeopardy claim is needed to resolve the conflict among the circuit courts of appeals, for which reason this petition should be granted.

III. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER A SECOND INDICTMENT WHICH CHARGES AN ACCUSED WITH THE SAME CONSPIRACY FOR WHICH HE WAS PREVIOUSLY CHARGED, TRIED AND ACQUITTED IS INSULATED FROM ATTACK UNDER THE DOUBLE JEOPARDY CLAUSE FOR THE REASON THAT IT ALLEGES THE CONSPIRACY CONTINUED BEYOND THE DATE OF THE ACCUSED'S ACQUITTAL.

The alternative ground on which the district court based its decision, the merits of which were not addressed by the court of appeals, was that because the indictment alleges conduct which took place subsequent to petitioner's acquittal in 1978, this Court's holding in Grady does not bar the prosecution of

counts 1 and 2 even if the conspiracy for which petitioner stands accused is the same as that of which he was acquitted. This analysis by the district court brings to the forefront an issue that has already divided the courts of appeals -- how, and indeed whether, Grady applies to continuing offenses such as RICO and conspiracy.

Specifically, the district court held that Grady was "limited to situations where all of the conduct giving rise to the various criminal offenses either occurs at the same instant or is completely known to the government before it begins the initial prosecution." Order at 8; App. at A23. Because the indictment alleges overt acts subsequent to petitioner's acquittal and the predicate acts of racketeering were alleged to have occurred between 1985 and 1987, the court reasoned that even though the indictment

reached back to 1973, the Double Jeopardy Clause did not bar its prosecution because this constituted "new conduct." Order at 9; App. at A25.

But, the exception relied on by the district court cannot rationally be applied to continuing crimes, such as conspiracy, because the essence of the crime of conspiracy is the agreement, no matter how many objectives it may have and no matter how many acts are undertaken in furtherance of it. United States v. Broce, 109 S. Ct. 757, 762 (1989); Braverman v. United States, 317 U.S. 49, 53, 63 S. Ct. 99, 101 (1942).

The district court's analysis suggests, as the government has argued throughout this case, that Grady is simply not applicable to continuing offenses, such as conspiracy or RICO. However, the reasons underlying Grady's holding have as much force when an ac-

cused is successively prosecuted for the same conspiratorial agreement as when an accused is successively prosecuted for multiple offenses arising out of a discrete criminal episode, and nothing in Grady itself suggest otherwise.

Yet the applicability of Grady to conspiracy and RICO in spite of the recency of that decision, has already caused a division among the circuits. Specifically, the Third Circuit has concluded that Grady does not apply to complex-compound offenses, including conspiracies, see, e.g., United States v. Esposito, 912 F.2d 60 (3d Cir. 1990), petition for cert. dismissed pursuant to S. Ct. R. 46, 111 S. Ct. 806 (1991). The Second and Tenth Circuits have concluded that Grady applies to all double jeopardy claims based upon successive prosecutions. See United States v. Calderone, 917 F.2d 717 (2d Cir. 1990); United

States v. Felix, ___ F.2d ___, 1991 WEST-LAW 23377 (10th Cir. 1991). The Ninth Circuit declined to address the issue in the instant case.

Moreover, the district court made much more of the fact that post-acquittal conduct is charged in the indictment than is warranted, for the indictment, on its face, alleges that all of the principal events had occurred by June of 1973.

Specifically, the indictment returned by the grand jury expressly charges that by June of 1973, five years before the Cleveland trial, petitioner had agreed that Talk of the Town would distribute by mail and common carrier the very films and videotapes whose mailing and interstate shipment by common carrier between the years 1985 and 1987 serve as the basis for the predicate acts of racketeering charged in the indictmment.

And, it charges that companies controlled by petitioner would supply Talk of the Town with those films and videotapes pursuant to the same distribution scheme the government proved at the Cleveland trial. Therefore, the indictment is clear that these events central to the conspiracy charged in the case at bar were in place years before the Cleveland trial.

Moreover, the testimony and exhibits from the Cleveland trial clearly show that Sundial, Talk of the Town and other Nevada stores were a part of the national distribution scheme proved by the government at the Cleveland trial.

Thus, the most that the district court could reasonably have concluded is that the same films which were stocked and distributed by Talk of the Town bookstore beginning in June, 1973, continued to be distributed after petitioner's acquittal.

Petitioner's acquittal of conspiring to distribute obscene materials between 1973 and 1976 constitutes a determination that the agreement with which he was charged was a lawful one. The government cannot, consistent with the protections guaranteed by the Double Jeopardy Clause, on the one hand reach back to 1973 and prosecute petitioner for the same agreement, and on the other, rely on post-acquittal conduct to re-litigate the lawfulness of that agreement.

Because of the important constitutional issue presented, this Court should hear this case.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully urges this Court to grant the petition for a writ of certiorari and accept this case for review.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE No. 90-10351
D.C. No. CR-S-87-278-LDG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

REUBEN STURMAN,

Defendant-Appellant.

MEMORANDUM*

Appeal from the United States District Court for the District of Nevada
Lloyd D. George,
District Judge, Presiding

Argued and Submitted October 4, 1990
San Francisco, California

Before: GOODWIN, Chief Circuit Judge, BROWNING and RYMER, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Reuben Sturman appeals the district court's denial of his motion to dismiss Counts 1 and 2 of the second superseding indictment charging him with a RICO conspiracy and a substantive RICO offense predicated on obscenity offenses. The district court rejected Sturman's argument that the two counts violated the Double Jeopardy Clause of the Constitution based on Sturman's [2]acquittal in Cleveland in 1978 of charges of conspiracy to violate federal obscenity laws.

This court has jurisdiction over this appeal from a pretrial denial of a defendant's motion to dismiss on double jeopardy grounds under 28 U.S.C. § 1291 and Abney v. United States, 431 U.S. 651, 662 (1977). We affirm.

I

Since the trial has not yet commenced, we review for clear error only

the district court's determination that proof of the conduct constituting the offense of which defendant has been acquitted would not be essential to prove the offense now charged. United States v. Bendis, 681 F.2d 561, 566 (9th Cir. 1981).

Because Sturman has made a non-frivolous showing of former jeopardy, see infra, the government bears the burden of establishing separate offenses are involved. Id. at 564. The district court's opinion is silent as to the burden of proof, and Sturman argues the order therefore is "constitutionally suspect" and the matter should be remanded for further proceedings. United States v. Ragins, 840 F.2d 1184, 1193 (4th Cir. 1988). A remand is unnecessary. Defense counsel informed the district court of the appropriate allocation of the burden of proof, and the government did not deny

that it bore that burden. There is no reason to believe the experienced trial judge disregarded what both parties conceded. Cf. id. at 1191 (noting the district court "apparently assumed that [the burden of proof] lay with the defendant throughout the proceeding.").

[3] II

The Supreme Court recently restated the standard for determining whether the Double Jeopardy Clause bars a subsequent prosecution. Even if each of two prosecutions "requires proof of a fact which the other does not," and thus satisfies the traditional test laid out in Blockburger v. United States, 284 U.S. 299, 304 (1932),

> the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

Grady v. Corbin, 110 S.Ct. 2084, 2087 (1990). The Grady test does not preclude the government from basing a later prosecution on the "same criminal transaction" upon which the defendant's earlier conviction rests, id. at 2094 n.15, nor preclude the government from introducing evidence in the later proceeding that was introduced in the prior proceeding. Id. at 2093 n.12; see also Dowling v. United States, 110 S. Ct. 668, 673-74 (1990).

The district court found the indictment in the present case alleged a RICO conspiracy focusing on an agreement between Sturman and other owners of retail outlets regarding the retail distribution of pornographic materials, whereas the conspiracy which was the subject of the Cleveland trial focused on an agreement between Sturman, Sovereign News, and other "agency companies" or distributors not named in the Cleveland indictment re-

garding the regional or wholesale distribution of pornography. Speaking of the present indictment, the court found "that there [4] is a different agreement entered into by different conspirators with a different focus than the Cleveland conspiracy." The court continued,

> this agreement is sufficiently dissimilar that it constitutes 'conduct' different from that for which Sturman has already been prosecuted. The court also finds that the Cleveland conspiracy is not an essential element of this indictment, since the government need not prove the existence of the Cleveland conspiracy in order to convict Sturman in this case.

On the present record we cannot say these findings are clearly wrong.[1/]

[1/] Because we affirm on this ground we do not consider other grounds relied upon by the district court or those argued by the government on appeal, including whether Grady necessarily applies to the type of offenses charged in this indictment.

To support his argument that the present indictment alleges the same agreement the government attempted to prove at the Cleveland trial, Sturman points to evidence introduced at the Cleveland trial concerning retail bookstores, and in particular, Talk of the Town Bookstore. Although evidence was introduced at the Cleveland trial describing the distribution of materials to retail bookstores and indicating Sturman and some of his codefendants controlled a number of such bookstores, the only agreement the government attempted to prove was one between Sturman and regional distributors of pornography.

Sturman contends the government is collaterally estopped by the district court's decision in United States v. Kamins, 479 F. Supp. 1374 (W.D. Pa. 1979), from arguing the Cleveland trial did not include an agreement relating to

retail distribution. The Kamins court held a subsequent Pittsburgh indictment barred [5]by double jeopardy because of the Cleveland acquittal. As we read the findings of the Kamins court regarding the scope of the Cleveland conspiracy, however, they do not include a finding that the conspiracy tried in Cleveland encompassed the agreement regarding retail bookstores alleged in the present case.

Because the district court did not clearly err in concluding that proof of the conduct for which Sturman was tried in Cleveland was not essential to proof of the offense alleged in this case, we AFFIRM.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Case No. CR-S-87-278-LDG

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

REUBEN STURMAN,

Defendant.

ORDER

On February 10, 1989, the government filed its second superseding indictment, charging Reuben Sturman and four other defendants with RICO violations predicated upon federal obscenity offenses. Sturman now contends that the Fifth Amendment's Double Jeopardy Clause bars prosecution of the two RICO counts because the government will prove conduct constituting an offense for which he was prosecuted in 1978. Grady v. Corbin, 58

U.S.L.W. 4599, 4602 (May 29, 1990). However, for the reasons set forth below, the court finds no Double Jeopardy violation, and will therefore deny Sturman's motion.

FACTUAL BACKGROUND

This indictment represents the fourth federal obscenity prosecution against Reuben Sturman in the past 14 years. The three previous indictments alleged both a general conspiracy in violation [2]of 18 U.S.C. § 371 and specific substantive obscenity offenses in violation of 18 U.S.C. §§ 1461, 1462. However, of the three previous prosecutions, only the 1976 Cleveland indictment actually went to trial.

That indictment described a conspiracy (the "Cleveland conspiracy") between Sturman and several co-defendants, including Sovereign News Co., to distribute obscene material from headquarters

in Cleveland, Ohio via interstate carriers and the United States Postal Service. In the indictment, the government claimed that the conspiracy existed from September 1973 to March 1976. After a lengthy trial, all defendants were acquitted of both the conspiracy and the underlying obscenity charges.

Unlike the previous prosecutions, this indictment does not allege a § 371 conspiracy. Instead, the government has charged Sturman with racketeering activity under RICO, specifically 18 U.S.C. § 1962(c) and 1962(d). But while all of the predicate obscenity offenses occurred between January 1985 and July 1987, the government nevertheless alleged a RICO conspiracy beginning in June 1973, thereby overlapping the Cleveland conspiracy.

Furthermore, the government has indicated that it will rely on and at-

tempt to introduce business records seized during two March 1975 searches at Sovereign News. During the 1978 trial, the government used evidence from these searches to prove the nature and scope of the Cleveland conspiracy. The government indicates that it will introduce some of these records to establish a conspiratorial relationship that existed as early as 1973 and [3]continued in existence until the date this indictment was filed.

Sturman now argues that Grady requires the court to dismiss the two RICO counts. The government opposes the motion, contending, among other things, that while the conspiracy began in 1973, Sturman is not being prosecuted for "conduct" occurring during the Cleveland conspiracy. Rather he is being prosecuted for different conduct undertaken by this conspiracy after the Cleveland trial.

DOUBLE JEOPARDY

Initially, the court notes that Sturman does not contend that the RICO counts violate the traditional Blockburger test, Blockburger v. United States, 284 U.S. 299 (1932), or the Ninth Circuit's factor analysis. Eg. United States v. Flick, 716 F.2d 735 (9th Cir. 1983). Moreover, after reviewing the transcript of the 1978 Cleveland trial and the relevant case law, the court finds that this indictment satisifies those double jeopardy grounds.

Instead, Sturman relies on Grady, in which the Supreme Court identified an additional step in the double jeopardy analysis. Under Grady, courts no longer end their inquiry with the Blockburger test. They must now determine whether the government will prove, as an essential element of its prosecution, "conduct that constitutes an of-

fense for which the defendant has already been prosecuted." Grady, 58 U.S.L.W. at 4599, 4602.

In order to prove the conspiracy alleged in this indictment, Sturman argues that the government will necessarily be proving the same conspiracy for which he was acquitted after the 1978 Cleveland trial. In support of his position, he maintains that the time [4]period set forth in this indictment includes the time period alleged in the Cleveland conspiracy, that some of the indictment's allegations describe activities performed by Sovereign News, that the indictment alleges the defendants used the same distribution channels described in the Cleveland conspiracy, and that the government will introduce evidence used during the Cleveland trial.

Furthermore, while the Cleveland indictment, on its face, described a nar-

row conspiracy, the government actually introduced evidence of a nationwide scheme. Sturman argues that the evidence at the Cleveland trial attempted to establish that Sovereign News and other companies controlled by Sturman would ship obscene materials to Sturman-controlled regional distributors that would then distribute the materials to local retail stores, some of which were also allegedly controlled by Sturman.

He contends that since the government has already prosecuted him for the nationwide conspiracy, it may not now dismember that conspiracy and retry him for portions thereof. United States v. Kamins, 479 F.Supp. 1374, 1390 (W.D. Pa. 1979). To do so, he argues, would allow the government to prosecute him for "conduct constituting an offense for which [he] has already been prosecuted." Grady, 58 U.S.L.W. at 4599, 4602.

I.

However, the court rejects Sturman's double jeopardy arguments. The "conduct" at issue here is the conspiracy the government attempted to establish in the 1978 Cleveland trial. Therefore, to determine whether the government will prove conduct for [5]which Sturman was already prosecuted, the court must ascertain the Cleveland conspiracy's "precise nature and extent ... by reference to the agreement which embraces and defines its objects." Braverman v. United States, 317 U.S. 49, 53 (1942).

Accordingly, the court has reviewed a substantial portion of the 1978 Cleveland trial transcript and finds that the nature and scope of the agreement prosecuted at that trial is different from the nature and scope of the agreement alleged in this indictment. True, in 1978 the government attempted to prove

a nationwide conspiracy emanating from Cleveland, Ohio and controlled by Reuben Sturman. Both indictments also deal with the interstate transportation of obscene material. Additionally, some of the exhibits contained information about, memos sent to, or shipments for Talk of the Town, as well as other bookstores at issue in this indictment. And some evidence indicated that the distribution channel used by the Cleveland conspiracy included Sturman controlled retail bookstores that received their materials either directly from Sovereign News itself or from the Sovereign News "agency companies," including Sundial Distributors in Denver.

Nevertheless, during the Cleveland trial the government focused on the conspiracy between Sovereign News and the agency companies. The only retail bookstore about which the government pre-

sented any specific evidence was Circus Bookstore in Philadelphia. But even with respect to Circus Bookstore, the government did not focus on the nature and extent of Sturman's agreement with Schmukler. In fact, the trial court excluded any testimony about [6]the nature of the agreement on the grounds that it constituted another agreement outside the scope of the Cleveland conspiracy.

Consequently, the government focused only on the fact that Sturman owned and controlled the bookstore. During closing arguments, the government used the testimony to argue that even though Sturman was not identified anywhere as an owner, he did in fact have an ownership and control interest in the bookstore. This testimony bolstered the government's position that Sturman owned and controlled Sovereign News, the agency companies, Western Reserve, and Wilson

and Company, even though no documents identified him as an owner.

Little other evidence of Sturman's involvement with retail bookstores was presented. Maurice Escott testified that Sturman, through Western Reserve, controlled the day-to-day operations of approximately 80 to 100 retail bookstores throughout the country. Additionally, Katharine Carberry testified that Castle News, an agency company, received financial information from several retail bookstores, and that the bookstores' checkbooks were kept at Castle News. The government also introduced a three-ring binder containing corporate information about retail bookstores Sturman allegedly controlled, including Talk of the Town Bookstore and the Pearl Bookstore.

But, again, the testimony was limited to the fact that Western or Castle News controlled the stores and

received financial information from them. None of the evidence dealt with the nature and scope of agreements relating to those stores or the agreements.

[7] Thus, the conspiracy alleged in this case materially differs from the one alleged in United States v. Kamins, 479 F.Supp. 1374 (W.D. Pa. 1979). The Kamins conspiracy centered around Majestic News Company in Pittsburgh, one of the "agency" or regional distributor companies in the Cleveland trial. That indictment alleged that Sturman and Kamins, both of whom were indicted in Cleveland, controlled Majestic News from Cleveland and that Majestic News in turn distributed the obscene materials to local bookstores. The Kamins indictment simply described the Cleveland conspiracy in a different way.

Here, however, rather than dismembering the "beast"[1/] brought into Cleveland, the government has brought a completely different, albeit smaller, "beast" to Las Vegas. Without question, this smaller beast still "lives off" the great beast prosecuted in 1978. And it undoubtedly furthers the interests and purposes of the Cleveland conspiracy. Nevertheless, the court finds that this is a different agreement entered into by different conspirators with a different focus than the Cleveland conspiracy.

Therefore, the court concludes that this agreement is sufficiently dissimilar that it constitutes "conduct" different from that for which Sturman has already been prosecuted. The court also finds that that Cleveland conspiracy is not an essential element of this indict-

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1/ Kamins, 479 F.Supp. at 1490.

ment, since the government does not need to prove the existence of the Cleveland conspiracy in order to convict Sturman in this case.

[8] The court recognizes that some allegations in this indictment describe activities occurring during the time period alleged in the Cleveland conspiracy, that some allegations concern conduct in conjunction with companies and individuals identified in the conspiracy, and that the government may present some of the same evidence it presented in Cleveland. But that does not bar this prosecution. Grady, 58 U.S.L.W. at 4602; Dowling v. United States, 110 S. Ct. 668, 672 (1990).

II.

Furthermore, even if the court were to accept Sturman's position that the conspiracies at issue here are the same, the Double Jeopardy Clause still

would not bar prosecution. Grady, and the cases upon which it relies, focused on the constitutional concerns about successive prosecutions for multiple offenses arising out of the same events or occurrences. Grady, 58 U.S.L.W. at 4601-02. Therefore, it seems that Grady may be reasonably limited to situations where all of the conduct giving rise to the various criminal offenses either occurs at the same instant or is completely known to the government before it begins the initial prosecution. But this indictment, for several reasons, does not implicate those concerns.

First, an exception to the double jeopardy analysis exists when the government cannot prosecute an additional, more serious charge at the outset because "the facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of

due diligence." Grady, 58 U.S.L.W. at 4601 n.7. [9]Whether the circumstances of this case present a lesser or greater included offense scenario, the policy remains equally applicable. None of the predicate acts had occurred and much of the evidence that will be used was not available to the government, and perhaps did not even exist, in 1978.

Second, this case does not present the same double jeopardy dangers normally associated with conspiracy indictments alleging time periods that overlap previously prosecuted conspiracies. In those cases, the overt acts and substantive offenses usually occur roughly within the same period of time. Under those circumstances, the "artful tailoring of the overt acts charged in the substantive counts . . . [might permit] the artificial subdivision of one conspiracy to support multiple

charges of violations of a single statute." United States v. Flick, 716 F.2d 735, 737 (9th Cir. 1983).

By contrast, here, the predicate and overt acts support charges of different crimes, and many of those acts occurred several years after Sturman was acquitted in Cleveland. The government did not simply subdivide a single conspiracy to support additional charges that it could have brought in 1976. It indicted Sturman for new conduct. Under these circumstances, the double jeopardy clause does not bar prosecution of the two RICO counts. See United States v. Persico, 774 F.2d 30, 32 (2nd Cir. 1985).

Finally, even though Sturman was acquitted in 1978, it does not necessarily follow that the government is now forever precluded from charging a conspiracy based on the agreements he entered [10]during that time period. A

conspiracy continues to exist until its principal purposes have either been attained or abandoned. Krulewitch v. United States, 336 U.S. 440, 442 (1949). Every act performed in furtherance of the conspiracy tacitly reaffirms that original agreement. See Hyde v. United States, 225 U.S. 347, 365 (1911); United States v. Mayo, 721 F.2d 1084, 1091 (7th Cir. 1983).

Without questions, the Double Jeopardy Clause would bar prosecution of any criminal activities undertaken solely during the Cleveland conspiracy's existence. But it should not now prevent the government from proving that an agreement was entered during that period, that it continued to operate long after the trial ended, and that pursuant to that original, continuing agreement Sturman subsequently engaged in activities that allegedly violate federal law. To hold

otherwise, could effectively grant Sturman immunity from any further conspiracy charge even though the conspiracy may in fact exist and engage in illegal activities pursuant to the same agreements.

CONCLUSION

In 1978, the government unquestionably attempted to prove a master, nationwide obscenity conspiracy controlled by Reuben Sturman. It does not, however, necessarily follow that the government cannot subsequently prosecute Sturman for different agreements and conspiracies carried out to further that master plan.

This indictment charges Sturman with different predicate acts, involving different people, at different times. Though the genesis of the agreement may stem from the same time period as the Cleve[ll]land conspiracy, the indictment alleges a different agreement, and thus,

different conduct. Grady does not bar prosecution of this "conduct" committed pursuant to a different, but related, agreement, and based on predicate acts that had not even occurred in 1978.

Therefore, for the reasons set forth above,

IT IS ORDERED THAT Sturman's Motion to Dismiss (#429) is denied.

DATED: 9 July 1990

/s/ Lloyd D. George
LLOYD D. GEORGE
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE No. 90-10351
D.C. No. CR-S-87-278-LDG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

REUBEN STURMAN,

Defendant-Appellant.

ORDER

Before: GOODWIN, Chief Circuit Judge, BROWNING and RYMER, Circuit Judges

The petition for rehearing is denied.

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 371

§ 371. Conspiracy to Commit Offense or Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1962

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or

of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of any unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise of which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this subsection.

Supreme Court, U.S.
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No. 90-1510

In the Supreme Court of the United States

OCTOBER TERM, 1990

REUBEN STURMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the RICO conspiracy count against petitioner was barred by the Double Jeopardy Clause because of petitioner's previous acquittal for non-RICO conspiracy.

2. Whether the court of appeals employed an incorrect standard of review in affirming the denial of petitioner's motion to dismiss the indictment on double jeopardy grounds.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum decision of the court of appeals (Pet. App. A1-A8) is unreported, but the judgment is noted at 919 F.2d 147 (Table). The opinion of the district court (Pet. App. A9-A28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1990. A petition for rehearing was denied on February 20, 1991. The petition for a writ of certiorari was filed on March 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 10, 1989, a grand jury in the District of Nevada returned an indictment against petitioner charging him with participating in the affairs of an enterprise through a pattern of racketeering activity (RICO), in violation of 18 U.S.C. 1962(c); conspiring to commit a RICO violation, in violation of 18 U.S.C. 1962(d); six counts of interstate transportation of obscene material, in violation of 18 U.S.C. 1462; and two counts of mailing obscene material, in violation of 18 U.S.C. 1461. Thereafter, petitioner moved to dismiss the RICO counts on double jeopardy grounds. The district court denied the motion, Pet. App. A9-A28, and the court of appeals affirmed, *id.* at A1-A8.

1. In the substantive and conspiracy counts under the RICO statute, the February 1989 indictment charged that, from June 1973 until the date of the indictment, petitioner and others conducted the affairs of the Talk of the Town bookstore, a so-called "adult" bookstore in Las Vegas, Nevada, with affiliates in Nevada and California, through a pattern of racketeering activity. Indictment, Count 1 ¶ 2; Count 2 ¶ 2. According to the indictment, petitioner and his co-conspirators used the bookstore to conduct a mail order business in sexually explicit films and videotapes. Count 1 ¶ 4. It was part of the conspiracy that various business operations controlled by petitioner, including Sovereign News Co. and Sundial Distributors, would supply the bookstore and its affiliates with sexually explicit material for resale, Count 1 ¶ 5; that, at the behest of petitioner, a portion of the revenues obtained through the bookstore and its affiliates would regularly be transported to Los Angeles, California, and to Cleveland, Ohio, where petitioner lived, Count 1 ¶ 8; and that the identity of the individuals who owned and operated the bookstore, including

petitioner, would be concealed through the use of nominees and fictitious persons, Count 1 ¶ 9. The RICO counts alleged the commission, from January 4, 1985, until July 23, 1987, of eight predicate acts of racketeering consisting of the interstate transportation or mailing of obscene material. Count 1 ¶ 10; Count 2 ¶ 3.

2. In 1976, petitioner was indicted in the Northern District of Ohio for conspiring with Sovereign News and others not charged in the instant indictment to violate the federal obscenity laws, in violation of 18 U.S.C. 371, and with numerous substantive obscenity offenses. The alleged conspiracy, which lasted from September 1973 to March 1976, entailed the wholesale distribution of obscene material from Sovereign News in Cleveland, Ohio, via interstate carriers and the mail. Pet. App. A11. All the overt acts charged in the 1976 indictment consisted of the shipment of obscene material to an adult bookstore in Fort Worth, Texas. Pet. 7.

At the trial on the 1976 indictment, the government introduced exhibits relating to shipments of obscene material to the Talk of the Town bookstore and other bookstores at issue in the instant indictment. Pet. App. A17. The government also introduced evidence indicating that the distribution channel used by the Cleveland conspiracy included bookstores controlled by petitioner that received their material either directly from Sovereign News or from Sovereign News's regional distributors, including Sundial Distributors in Denver. *Ibid.* After trial, petitioner was acquitted on all counts.

3. Relying on *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), petitioner moved to dismiss the RICO counts in the instant case on double jeopardy grounds. He argued that, in proving the RICO counts, the government would necessarily prove the same conspiracy of which he had previously been acquitted. The district court rejected that contention, holding that "[t]he 'conduct' at issue here is [not] the con-

spiracy the government attempted to establish in the 1978 Cleveland trial." Pet. App. A16. The court explained that during the Cleveland trial the government focused on the conspiracy between Sovereign News and the regional distributors regarding the wholesale distribution of obscene materials, and not on petitioner's involvement with retail bookstores. *Id.* at A17-A20. Accordingly, the court concluded that "[the] Cleveland conspiracy is not an essential element of this indictment, since the government does not need to prove the existence of the Cleveland conspiracy in order to convict [petitioner] in this case." *Id.* at A21-A22.

The district court further held that, even if the two indictments charged the same conspiracy under *Grady*, the Double Jeopardy Clause still would not bar the instant prosecution. Pet. App. A22-A23. The court explained that *Grady* "may be reasonably limited to situations where all of the conduct giving rise to the various criminal offenses either occurs at the same instant or is completely known to the government before it begins the initial prosecution." *Id.* at A23. The court observed that here, by contrast, none of the predicate acts had occurred and much of the evidence was not available to the government at the time of the earlier indictment and trial. *Id.* at A24. The court thus concluded that the instant indictment charges "new conduct" whose prosecution is not barred by the Double Jeopardy Clause, even if that conduct is a continuation of the previously prosecuted conspiracy. To hold otherwise, the court stated, would be to "grant [petitioner] immunity from any further conspiracy charge even though the conspiracy may in fact exist and engage in illegal activities." *Id.* at A26-A27.

4. Petitioner took an interlocutory appeal under *Abney* v. *United States*, 431 U.S. 651 (1977), from the denial of his motion to dismiss. The court of appeals affirmed. Pet. App. A1-A8. It concluded that the district court was not "clearly wrong" in its determination that the instant indict-

ment charges "a different agreement entered into by different conspirators with a different focus than the Cleveland conspiracy." *Id.* at A6. While acknowledging that "evidence was introduced at the Cleveland trial describing the distribution of materials to retail bookstores and indicating [petitioner] and some of his codefendants controlled a number of such bookstores," the court concluded that "the only agreement the government attempted to prove was one between [petitioner] and regional distributors of pornography." *Id.* at A7. Because of its determination that the two indictments did not charge the same "conduct" within the meaning of *Grady*, the court did not consider whether *Grady* "necessarily applies to the type of offenses charged in this indictment." *Id.* at A6 n.1.

ARGUMENT

1. Petitioner contends (Pet. 24-36, 44-50) that his previous conspiracy prosecution forecloses the instant RICO conspiracy charge under the Double Jeopardy Clause. The courts below properly rejected that claim.

a. The courts of appeals to address the issue have uniformly held that the Double Jeopardy Clause permits successive prosecutions for non-RICO conspiracy and RICO conspiracy, even when the government uses some of the same evidence concerning the defendant's actions to prove both conspiracies. *E.g.*, *United States* v. *Gonzalez*, 921 F.2d 1530 (11th Cir. 1991), petition for cert. pending, No. 90-7857; *United States* v. *Gambino*, 920 F.2d 1108 (2d Cir. 1990), petition for cert. pending, No. 90-1689; *United States* v. *Scarpa*, 913 F.2d 993, 1013-1014 (2d Cir.), cert. denied, 111 S. Ct. 57 (1990); *United States* v. *Grayson*, 795 F.2d 278, 282-283 (3d Cir. 1986), cert. denied, 479 U.S. 1054 (1987); *United States* v. *Schell*, 775 F.2d 559, 568 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); *United States* v. *Watchmaker*, 761 F.2d 1459, 1466-1468 (11th Cir. 1985); *United*

States v. *Brooklier*, 637 F.2d 620 (9th Cir. 1981), cert. denied, 459 U.S. 1206 (1983). Cf. *Garrett* v. *United States*, 471 U.S. 773, 786, 789-790 (1985) (suggesting that complex offenses like RICO are not the "same offense" for double jeopardy purposes as their underlying predicate acts).[1] The decision of both courts below that petitioner's acquittal of a conspiracy under 18 U.S.C. 371 does not preclude later prosecution for RICO conspiracy thus comports fully with all prior federal appellate precedent.

b. Even if a non-RICO conspiracy prosecution could in some instances preclude a subsequent RICO conspiracy charge, the RICO conspiracy charge against petitioner would not be barred, because each conspiracy constituted a separate offense under the totality of the circumstances test traditionally employed by the courts to determine whether two conspiracies are the same for double jeopardy purposes. See, *e.g.*, *United States* v. *Ruggiero*, 754 F.2d 927, 932 (11th Cir.), cert. denied, 471 U.S. 1127 (1985); *United States* v. *Langella*, 804 F.2d 185, 189 (2d Cir. 1986); *United States* v. *MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986); *United States* v. *Marable*, 578 F.2d 151, 154 (5th Cir. 1978). Pursuant to that test, the factors to be considered are the time periods of the conspiracies; the places where the pertinent events occurred; the persons acting as co-conspirators; the statutory offenses that were the objects of the conspiracies; and the overt acts committed in furtherance of the conspiracies. See *Marable*, 578 F.2d at 154.

Here, although the two conspiracies overlapped for a period of three years, the RICO conspiracy continued for

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[1] In *Scarpa* and *Grayson*, successive prosecutions were held permissible even though the previously adjudicated non-RICO conspiracy was specifically alleged as a predicate act in the RICO conspiracy indictment. The result in this case, in which the non-RICO conspiracy was not itself charged as a predicate act, follows *a fortiori* from *Scarpa* and *Grayson*.

13 years after the indictment for the Cleveland conspiracy, and all of the predicate acts of racketeering charged in the RICO indictment postdated the earlier indictment. The earlier conspiracy took place primarily in Cleveland, while the RICO conspiracy was centered in Las Vegas, and petitioner was the only party named in both indictments. Further, the earlier indictment charged a conspiracy to violate the obscenity laws through the wholesale distribution of obscene materials, while the RICO indictment charged a conspiracy to violate the substantive provision of the RICO statute by operating retail "adult" bookstores. Finally, there was no overlap whatever between the overt acts charged in the two indictments. On this record, there can be no doubt that the two conspiracies were not the same.

c. Quite apart from the differences for double jeopardy purposes between the two conspiracies, petitioner's successive federal prosecutions were permissible because the RICO conspiracy continued for 13 years past the date of the earlier indictment and all the predicate acts of racketeering charged against petitioner postdated that indictment. As the Court held in *Garrett*, 471 U.S. at 791-792, a defendant may be successively prosecuted where the second-charged offense was not committed until after the earlier indictment, because the earlier indictment could not have put him in jeopardy for that offense. See *id.* at 797-798 (O'Connor, J., concurring). Under petitioner's argument, a member of a conspiracy who has once been prosecuted for conspiring to commit certain offenses would obtain a lifetime grant of immunity from future prosecution for conspiring to commit the same offenses at a later date, even if he continued indefinitely to promote the commission of those criminal acts through his membership in the conspiracy.[2]

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[2] Where, as here, the first prosecution results in an acquittal, the defendant would of course be protected against future prosecutions

d. In support of his claim, petitioner relies on *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), in which the Court held that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct which constitutes an offense for which the defendant already has been prosecuted." *Id.* at 2087. *Grady*, however, does not help petitioner's cause.

First, the *Grady* test has no application in the RICO context. In *Grady* the successive prosecutions involved simple offenses—misdemeanor traffic violations and homicide—that occurred simultaneously during a single course of conduct spanning a brief period of time. A RICO charge, by contrast, entails proof of multiple criminal acts committed in furtherance of an ongoing enterprise and occurring over an extended time span. As the Court stated in *Garrett*, 471 U.S. at 788, a complex offense such as RICO does not "lend itself to the simple analogy of a single course of conduct." Contrary to petitioner's contention (Pet. 47-48), the courts of appeals have found *Grady* inapplicable in RICO cases. See *United States* v. *Gonzalez*, 921 F.2d at 1535-1539; *United States* v. *Link*, 921 F.2d 1523 (11th Cir. 1991); *United States* v. *Esposito*, 912 F.2d 60 (3d Cir. 1990); *United States* v. *Pungitore*, 910 F.2d 1084, 1109-1111 (3d Cir. 1990), cert. denied, No. 90-1145 (May 13, 1991). But see *United States* v. *Russo*, 906 F.2d 77 (2d Cir. 1990) (accepting government's concession on facts of that case that *Grady* barred prosecution for acts that had been charged as predicate acts in a prior RICO prosecution).

Even if the *Grady* test does apply in this context, the non-RICO and RICO conspiracies in this case did not involve

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under the doctrine of collateral estoppel of *Ashe* v. *Swenson*, 397 U.S. 436 (1970). Petitioner does not claim in his petition that the doctrine of collateral estoppel would bar the present prosecution.

the same conduct. As we have shown, the two prosecutions entailed separate agreements to achieve different objectives over substantially different time periods. Accordingly, both courts below correctly concluded that "the Cleveland conspiracy is not an essential element of this indictment, since the government need not prove the existence of the Cleveland conspiracy in order to convict [petitioner] in this case." Pet. App. A6, A21-A22. Although evidence was introduced at the Cleveland trial describing the distribution of materials to retail bookstores and indicating that petitioner and his co-defendants controlled a number of such bookstores, the retail distribution of obscene materials was not the conduct for which petitioner was prosecuted. Nor does the introduction of evidence regarding the Talk of the Town bookstore at the earlier trial alter the analysis. *Grady* does not bar the use of the same evidence at successive trials, as long as the two prosecutions are not for the same conduct. 110 S. Ct. at 2093.

Finally, *Grady* did not renounce the rule allowing successive prosecutions where, as here, the offense charged in the later case had not been completed at the time of the indictment in the earlier case. See *United States* v. *Gambino*, 920 F.2d at 1112-1113; *United States* v. *Scarpa*, 913 F.2d at 1013-1014 n.8; *United States* v. *Pungitore*, 910 F.2d at 1111, 1115 & n.37. As noted above, that rule was established quite clearly in *Garrett*—a case cited in *Grady* with apparent approval, see 110 S. Ct. at 2091, 2094 n.15—and the *Grady* Court itself expressly reaffirmed that the Double Jeopardy Clause does not bar a subsequent prosecution where "the State is unable to proceed on the [latter] charge at the outset because the additional facts necessary to sustain that charge have not occurred." 110 S. Ct. at 2090 n.7.[3]

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[3] Contrary to petitioner's argument (Pet. 47), *United States* v. *Calderone*, 917 F.2d 717 (2d Cir. 1990), petition for cert. pending,

2. Petitioner contends (Pet. 37-44) that the court of appeals should have reviewed his double jeopardy claim *de novo* rather than under the "clear error" standard of review. As petitioner points out (Pet. 41-42), the courts of appeals have differed concerning the appropriate standard of review in *Abney* appeals of district court factual findings concerning whether two charged conspiracies constitute the "same offense." Compare *United States* v. *Beachner Construction Co.*, 729 F.2d 1278, 1281 (10th Cir. 1984) (clearly erroneous standard); and *United States* v. *Bendis*, 681 F.2d 561, 565-566 (9th Cir. 1981) (same), cert. denied, 459 U.S. 973 (1982); and *United States* v. *Jabara*, 644 F.2d 574, 577 (6th Cir. 1981) (same), with *United States* v. *Benefield*, 874 F.2d 1503, 1505 (11th Cir. 1989) (*de novo* standard); and *United States* v. *Ciancaglini*, 858 F.2d 923, 926 (3d Cir. 1988) (same).

All of the above cited cases involved successive conspiracy prosecutions brought under the same statute. In each instance, to determine whether the second conspiracy was the

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No. 90-1527, does not support his invocation of *Grady*. In *Calderone*, a non-RICO case, the court held that, under *Grady*, the defendants' acquittal on charges of participating in a wide-ranging, multi-drug conspiracy barred a subsequent prosecution alleging a narrower, single-drug conspiracy. However, the same court has held that *Grady* does not bar successive prosecutions for non-RICO and RICO conspiracies in circumstances similar to those of the present case. *Gambino*, 920 F.2d at 1112-1113; *Scarpa*, 913 F.2d at 1013-1014 n.8.

Nor need this case be held pending the Court's disposition of the petition for a writ of certiorari in *United States* v. *Felix*, 926 F.2d 1522 (10th Cir. 1991), petition for cert. pending, No. 90-1599. *Felix* does not involve a RICO charge, but instead concerns the permissibility of prosecution for narcotics conspiracy and substantive narcotics offenses after a prior prosecution for attempt to manufacture narcotics in which evidence relevant to the narcotics conspiracy and the substantive narcotics charges was introduced to show intent.

"same offense" as that charged in the earlier prosecution, the district court had to answer the essentially factual question whether the successive conspiracy charges were based on the same agreement. Insofar as the courts of appeals have disagreed concerning the standard of review of such district court decisions, their disagreement concerns the appropriate standard of review of such essentially factual determinations.

The appropriate standard of review in *Abney* appeals of such factual determinations is not at issue in this case, for two reasons. First, the indictment in this case charges a conspiracy offense that is different as a matter of law from that for which petitioner was indicted in 1976. As discussed above, the conspiracy charged in the current indictment continued for 13 years after the conspiracy charged in petitioner's earlier prosecution. Under settled principles reiterated in *Garrett* and *Grady*, the government is thus permitted as a matter of law to prosecute the instant conspiracy regardless of the prior prosecution.[4] See pp. 7, 9, *supra*. Second, the current indictment charges petitioner with RICO conspiracy, in violation of 18 U.S.C. 1962(d), while he was charged in his earlier prosecution with ordinary con-

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[4] In *Bendis*, *Benefield*, and *Ciancaglini*, the later indictment similarly charged a conspiracy that had not yet been completed when the defendant was indicted for the conspiracy charged in the earlier indictment. See *Bendis*, 681 F.2d at 563; *Benefield*, 874 F.2d at 1504; *Ciancaglini*, 858 F.2d at 929. Thus, although the *Garrett* principle permitting successive prosecutions where the second indictment charges a crime continuing past the date of the first indictment could have been used to decide each of those cases, the courts of appeals in those cases chose not to rely on that possible ground of decision. Instead, they chose to review the district court's factual finding concerning whether the successive conspiracy prosecutions were based on the same agreement. The standard of review question thus concerns only such district court factual findings in *Abney* appeals.

spiracy under 18 U.S.C. 371. Thus, while the above cases concern the standard of review of factual determinations whether two indictments charging violation of the same statute charge different offenses, this case involves the fundamentally different question whether an indictment charging RICO conspiracy charges a different offense from an earlier indictment charging conspiracy under 18 U.S.C. 371. As noted above, see pp. 5-6, *supra*, every court of appeals to reach the issue has rejected the claim that a RICO conspiracy is the same offense as a previously charged conspiracy under another statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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